

22

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SAVAGE ENTERPRISES, INC. and)
NORTHSHORE SCHOOL DISTRICT)
#417,)
Appellants,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHB No. 86-179

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a notice and order of civil penalty for \$1000 for the alleged violation of air pollution control regulations concerning asbestos removal and disposal came on for hearing on September 3, 1987, in Seattle, Washington, before the Board, Wick Dufford (presiding), Lawrence J. Faulk and Judith A. Bendor. Respondent elected a formal hearing. The matter was reported by Eugene Barker and Associates.

Savage Enterprises was represented by its Attorney Douglas W. Elston. Northshore School District was represented by its attorney Fred J. Poss. Keith D. McGoffin, Attorney at Law, appeared for the Puget Sound Air Pollution Control Agency (PSAPCA).

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Argument was heard. From the testimony, evidence and
3 contentions of the parties, the Board makes these

4 FINDINGS OF FACT

5 I.

6 PSAPCA is an activated air pollution control authority under the
7 terms of the State's Clean Air Act, empowered to monitor and enforce
8 emission standards for hazardous air pollutants, including work
9 practices for asbestos removal and disposal. The agency has filed
10 certified copies of its regulations with the Board. Official notice
11 is taken of these regulations.

12 II.

13 Northshore School District No. 417 operates Sorenson School,
14 located at 13209 N.E. 175th Street in Woodinville (King County), the
15 site at issue in this appeal. Savage Enterprises, Incorporated, is a
16 company located in Seattle which specializes in asbestos removal
17 projects. In the spring of 1986, the School District contracted with
18 Savage to undertake pipe insulation removal from Sorenson School.

19 III.

20 On June 16, 1986, Savage filed with PSAPCA a Notice of Intent To
21 Remove or Encap Asbestos, referring to the Sorenson site. The notice
22 stated that the job would begin on June 26, 1986, and would involve
23
24
25

1 the removal of approximately 503 linear feet of asbestos material from
2 a building over 30 years old. The method of removal and encapsulation
3 was described as follows:

4 Wet removal, glove bag, HEPA, negative air
5 enclosure system and final coat of #207 special
6 sealer. Disposal in sealed, labeled, double 6 mil
7 plastic bags.

8 IV.

9 On Friday, June 27, 1986, at approximately 10:20 a.m., a PSAPCA
10 inspector arrived at the Sorenson School site for a routine inspection
11 in response to the Notice of Intent. She was accompanied by an
12 inspector from the State Department of Labor and Industries (L&I).
13 The PSAPCA inspector opened the basement door, which bore a sign
14 warning of asbestos removal but which was unlocked, and entered the
15 boiler room. In an office in the boiler room she observed a worker
16 removing what appeared to be asbestos insulation from a pipe. No
17 water was being used to wet the material during removal.

18 The two inspectors withdrew from the building, put on protective
19 clothing and respirators; then re-entered the basement. In a carpeted
20 play room next to the boiler room, PSAPCA's inspector observed a
21 worker removing insulation and applying what she termed "a minimal
22 amount of water" to it in the process. The material being removed was
23 being placed in a plastic bag.

The PSAPCA inspector then inspected the second floor of the building accompanied by Savage's foreman. She visited three different rooms in which insulation removal operations had been completed and the disposal bags had been taken away. Under pipes on the second floor rug she found small fragments of material she believed to be asbestos. The material was dry.

The PSAPCA inspector's observations were corroborated by the inspector from L&I. Photographs were taken which showed the debris found on the second floor.

V.

Samples were taken of the suspected asbestos material from the second floor, from the basement play room and from the boiler room. These samples were transmitted to the state Department of Ecology's laboratory.

Subsequent analysis of the samples showed the following average percentages of asbestos: a) second floor - chrysotile, 75%; amosite, 15%; (b) play room - chrysotile, 45%; amosite, 45%, (c) boiler room - chrysotile, 40-45%.

VI

During the inspection no air samples were taken by either inspector. Neither of them saw any dust emissions from the asbestos material at the school.

1 VII.

2 On the morning of the following Monday, June 30, 1988, PSAPCA's
3 inspector advised the director of maintenance and operations for the
4 School District of what she had seen at her inspection. A meeting was
5 arranged at the job site for early that afternoon. At about 1:20
6 p.m., the PSAPCA inspector accompanied by the same inspector from L&I
7 I met with representatives of the School District and of Savage at
8 Sorenson School. None of the problems they had observed the previous
9 Friday were then in evidence. The second floor had been cleaned of
10 debris under the pipes.

11 VIII.

12 On July 3, 1986, PSAPCA's inspector issued two Notices of
13 Violation for non-compliance with WAC 173-400-075 and for
14 non-compliance with identified provisions of the agency's regulations
15 on asbestos removal and disposal. The first of these (#21432) was
16 intended to apply to the dry removal of asbestos in the school
17 basement. The second (#21433) was intended to relate to the asbestos
18 fragments found on the second floor. Subsequently on September 11,
19 1986, the agency issued Notice and Order of Civil Penalty No. 6495,
20 assessing a penalty of \$1000 for the violations alleged earlier in the
21 two Notices of Violation.

IX.

Savage's president testified that the company had performed in the neighborhood of 600 asbestos removal jobs over the three previous years and that it always used certified asbestos workers, knowledgeable about proper removal and disposal techniques.

He said that readings from air samples taken for the company when the job commenced were low enough that they believed engineering controls for containing asbestos within the building were not needed. Protective suits and respirators were, nonetheless, prescribed for the workers as a matter of company policy.

X.

Neither of the inspectors actually observed the removal operations which occurred on the second floor. Savage's foreman who accompanied their inspection of that area did not deny that the work done there was performed by Savage. Under the circumstances we find the preponderance of the evidence to be that Savage's work was the source of the debris found on the second floor.

XII.

The School District described a program which called for removal of asbestos from one of its buildings each summer. Sorenson was the first building to undergo this process.

1 The District retained three certified asbestos removers on its
2 payroll to help identify asbestos and for use in case of emergency.
3 However, in June 1986, these employees were not supervising Savage's
4 workers. Under their contract the District did not exercise control
5 over the physical conduct of Savage's workers.

6 XIII.

7 The School District has never previously been cited for violation
8 of PSAPCA's asbestos handling regulations. PSAPCA introduced no
9 evidence of Savage's prior record. The Board takes official notice of
10 its decisions in Savage Enterprises, Inc. v. PSAPCA, PCHB 86-101,
11 (1987) and Kent School District No. 415 and Savage Enterprises, Inc.
12 v. PSAPCA, PCHB Nos. 86-190 and 86-195. (1987)

13 XIV.

14 Asbestos is a pollutant classified federally as a "hazardous air
15 pollutant." Under Section 112 of the Federal Clean Air Act this term
16 describes a substance which

17 causes, or contributes to, air pollution which may
18 reasonably be anticipated to result in an increase
19 in mortality or an increase in serious
20 irreversible, or incapacitating reversible, illness.

21 Asbestos is the subject of a special set of work practices adapted by
22 the United States Environmental Protection Agency (EPA) under the
23 rubric of National Emission Standards for Hazardous Air Pollutant

1 (NESHAP). 40 CFR 61.140 et sec... In the State of Washington, EPA has
2 delegated enforcement of the NESHAP program to PSAPCA, in the latter's
3 area of jurisdiction.

4 The State Ecology Department has adopted the federal standards on
5 asbestos by reference through WAC 173-400-075. PSAPCA has adopted its
6 own standards on the subject in Article 10 of its Regulation I which
7 are at least as stringent as those adopted by EPA.

8 The regulatory threshold for the regulation of asbestos is one
9 percent (1%). No safe limit of exposure has been established.

10 XV.

11 Any Conclusion of Law which is deemed a Finding of Fact is hereby
12 adopted as such.

13 From these facts, the Board comes to these

14 CONCLUSIONS OF LAW

15 I.

16 The Board has jurisdiction over these persons and these matters,
17 Chapters 70.94 and 43.21B RCW.

18 II.

19 Notice and Order of Civil Penalty No. 6495, issued to Savage
20 Enterprises and Northshore School District #417, states in pertinent
21 part:
22

23 On or about the 27th day of June, 1986, in King
24 County, State of Washington, you violated WAC

1 173-400-075 and Article 10 of Regulation I by
2 unlawfully causing or allowing the removal or
3 encapsulation of asbestos material at the
4 Woodinville/Sorenson School at 13209 NE 175th
5 Street, Woodinville, Washington, and failing to
6 comply with the following sections of Article 10 of
7 Regulation I:

- 8 1. Section 10,04(b)(2)(iii)(A) of Regulation I:
9 Failure to adequately wet asbestos materials
10 that have been removed or stripped and to ensure
11 that they remain wet until collected for
12 disposal --- Notice of Violation No. 21432.
- 13 2. Section 10.05(a) of Regulation I: Failure to
14 adequately wet asbestos materials that have been
15 removed or stripped, and, after wetting, seal;
16 all asbestos-containing waste materials in
17 leak-tight containers, while wet --- Notice of
18 Violation No. 21433.

19 III.

20 The School District contends that PSAPCA's rules, as applied here,
21 are invalid because they are beyond the agency's statutory authority.
22 The District argues that the agency may not adopt rules which apply to
23 the removal of asbestos inside a building. We disagree.

24 This battle has already been fought on a national level. In Adamo
25 Wrecking Company v. United States, 434 U.S. 275 (1978), the United
26 States Supreme Court held that the work practice requirements of
27 NESHAP were not emission standards authorized by the 1970 Amendments
to the federal Clean Air Act. But Congress in the 1977 amendments to
the Act resolved this matter for the future by specifically
authorizing such requirements. The work practices by their nature are
often applicable to indoor activities.

1 Under RCW 70.94.011 compliance with the federal Clean Air Act is
2 expressly made a part of the policy of the State Clean Air Act. By
3 this transfusion, PSAPCA is empowered to enact regulations which carry
4 out the mandates of the federal law. See RCW 70.94.141. Therefore,
5 PSAPCA has authority to adopt the rules applied in this case.

6 Moreover, the authority to specify work practices for hazardous
7 air pollutants inside buildings is consistent with state law alone.
8 The state Clean Air Act provides for a "coordinated statewide program
9 of air pollution prevention and control." RCW 70.94.011.

10 With asbestos we deal with material which is extraordinarily
11 dangerous. PSAPCA's Regulation 1, Article 10 begins as follows:

12
13 The Board of Directors of the Puget Sound Air
14 Pollution control Agency recognize that asbestos is
15 a serious health hazard. Any asbestos fibers
16 released into the air can be inhaled and can cause
17 lung cancer, pleural mesothelioma, peritoneal
18 mesothelioma or asbestosis. The Board has,
19 therefore, determined that any asbestos emitted to
20 the ambient air is air pollution.

21 By virtue of Article 10 as a whole, PSAPCA has, in effect, found as a
22 legislative fact that, unless asbestos is properly handled throughout
23 its removal and disposal, there is an unacceptable risk asbestos
24 fibers may escape to the ambient outdoor air. It is entirely
25 consistent with the statutory purpose of air pollution prevention to
26 regulate activities, whether indoors or out, which bear directly on

1 minimizing this risk. Reasonable consistency with statutory purposes
2 is all that is required of regulations. See, e.g., Weyerhaeuser v.
3 Department of Ecology, 86 Wn. 2d 310, 545 P.2d 5 (1976). PSAPCA's
4 asbestos regulations meet that test. Alpine Builders, Inc. and Tacoma
5 School District No. 10 v. PSAPCA, PCHB 86-183 & PCHB 86-192 (1987).

6 III.

7 The School District also contends the it should be shielded from
8 liability because Savage was an independent contractor whose conduct
9 was not subject to the District's control. Again we disagree.

10 We have held in the past and remain convinced that the duty which
11 applies in asbestos removal cases is non-delegable. Our conclusion in
12 this regard is strongly influenced by the ultra hazardous nature of
13 asbestos. Federal Way School District #210 v. PSAPCA, PCHB 86-164
14 (1987); See, Island Sea farms, Inc. v. Foster and Marshall Realty, 42
15 Wn.App. 308, 711 P.2d 1049 (1985).

16 IV.

17 Savage argues that PSAPCA has failed to describe the violations
18 with reasonable particularity and that the penalties should be
19 dismissed for this reason.

20 As to the asserted violations of WAC 173-400-075 we concur. The
21 mere recitation of the section number does not adequately meet the
22 requirement of RCW 70.94.431 for a description of the violation "with
23 reasonable particularity." Savage Enterprises, Inc. v. PSAPCA, PCHB
24 86-101 (1987).

However, as to the asserted violations PSAPCA Regulation I, Article 10, we believe that the description of the violation was sufficient to meet the statutory standard. The Notice and Order of Civil Penalty described in short form the acts or omissions complained of and gave the general location involved. While it might have been helpful to provide more detail -- particularly a specification of the particular room to which each allegation applied -- we do not believe these violations should be reversed for lack of specificity. In so concluding, we are mindful that pleadings in civil penalties cases serve primarily a notice function, Marysville v. PSAPCA, 104 Wn. 2d 115, 702 P.2d 469 (1985), and that the pre-trial procedures of the Civil Rules are available to all appellants to discover with greater precision what the agency's case is about. See WAC 371-08-031.

V.

Savage contends, in addition, that it should not be found in violation of PSAPCA's asbestos regulations, unless the agency shows that conditions meeting the definition of "air pollution" were created. This is a variant of the assertion that PSAPCA's asbestos regulations are invalid. We reject this argument. Having held that the regulations are consistent with the statute, we are left only with the question of whether the regulations in fact were violated. The demonstration¹ that emissions occurred is not necessary. Kent School District No. 415 and Savage Enterprises v. PSAPCA, PCHB Nos. 86-190 and 86-195 (1987).

PCHB No. 86-179
FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW & ORDER

1 VI.

2 Under the facts and circumstances we conclude that violations of
3 Regulation I, Section 10.04(b)(2)(iii)(A) and Section 10.05(a)
4 occurred at Sorenson School on June 27, 1986.

5 VII.

6 The purport of Section 10.04 is that during the process involving
7 stripping asbestos from pipes and placing it in sealed leak-tight
8 containers, the material must be "adequately wetted." The term
9 "adequately wetted" means "sufficiently mixed or coated with water or
10 any aqueous solution to prevent dust emissions."

11 The agency did not show that the removal observed in the basement
12 play room violated the "adequately wetted" standard. Some water was
13 being applied and there is no evidence about the effectiveness of this
14 application. However, the removal work in the office of the boiler
15 room is a different story. There the inspectors saw removal in
16 progress with no water being applied. Where no water is used we
17 conclude that the material is not "adequately wetted" as a matter of
18 law.

19 VIII.

20 Section 10.05 deals with the disposal of asbestos-containing
21 material, after the removal process has occurred. McFarland Wrecking
22 Corporation v. PSAPCA, PCHB No. 86-159 (1987). This section applies
23 to areas where the stripped asbestos debris has been bagged and taken
24

1 away for ultimate deposit at a disposal site. In the instant case,
2 the job upstairs had been completed. The materials found on the rug
3 on the second floor, therefore, failed to meet the requirement that it
4 be sealed in a leak tight container while wet as part of the disposal
5 process.

6 IX.

7 The purpose of civil penalties is to correct behavior and promote
8 future compliance. Here, although the problems were quickly
9 rectified, we are influenced by the history of violations of these
10 rules by Savage. Under all the facts and circumstances we conclude
11 that the penalty under appeal is reasonable.

12 X.

13 Any Finding of Fact which is deemed a Conclusion of Law is hereby
14 adopted as such.

15 From these Conclusions, the Board enters this
16
17
18
19
20
21
22
23
24
25

ORDER

Notice and Order of Civil Penalty No. 6495 is reversed as to any violation of WAC 173-400-075. In all other respects the notice is affirmed, including the assessment of a penalty of \$1000.

DONE this 22nd day of March, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 3/22/88
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member